

December 4, 2006

*Sent Via Facsimile*

Jeff Kovaleski  
The *Kokomo Tribune*  
300 N. Union Street  
Kokomo, IN 46901

*Re: Formal Complaint 06-FC-192; Alleged Violation of the Access to Public Records Act by the City of Kokomo*

Dear Mr. Kovaleski:

This is in response to your formal complaints alleging that the City of Kokomo (“City”) violated the Access to Public Records Act by taking an unreasonable amount of time to fulfill your records requests. I find that the City was required to respond within the appropriate timeframes and to provide information about whether the documents you requested existed in the form in which you requested them. I also find that the City took too long to provide certain documentation, but was not required to create records, or to create those records within any particular time, to satisfy your requests.

#### BACKGROUND

You filed five complaints with the Office of the Public Access Counselor, which I have consolidated within 06-FC-192. The gist of your complaints is that the City failed to provide requested documents within a reasonable period of time. Some of the documents were received from 73 to 92 days after you first requested the documents. I assigned Part numbers to each of your discrete complaints:

Part 1: You state that you requested a listing of all the attorney fees and deductibles paid by the city “year to date.” After receiving no response, the *Tribune* submitted a second request by certified mail on September 21, 2006. You received a letter from Controller Phillip Williams dated September 28 informing you that the City would compile the information and you would

be informed when it was available. You state that as of October 30, the information has not been provided. You calculate that you have been waiting for 82 days, which was from the date of your first request to the date you filed your complaint.

Part 2: You requested on August 16 “all city expenditures for KGOV” a local access cable television station, program schedules, and programs currently available to be aired on KGOV. Your second request was sent September 21, 2006. You received on September 28 a letter from Controller Williams confirming the request and stating that the information was being compiled and you would be informed when it was available. As of October 30 you still have not received the information, and have been waiting 75 days.

Part 3: You requested on August 16 “an itemized breakdown of all city spending on landscaping, including costs of concrete and curbing, city labor costs, planting and other costs related to the city beautification efforts.” Your second request was mailed September 21, and a letter dated September 28 from Controller Williams informed you that the information would be compiled and the *Tribune* would be notified when it would be available. You received a letter dated October 30 that stated that the requested information was not available because it would require the creation of a new document that would cost hundreds of man hours to create. The letter stated that there were responsive documents available for inspection, but the letter didn’t specify when they would be made available, you claim. You believe the City failed to respond to your request in a timely fashion.

Part 4: On August 16, you sent a request for “a copy of purchase order 003403 from the claims approved by the [Board of Public Works] on July 11, 2006.” You also requested “a copy of check No. 123674 related to the same purchase order voucher PI 1694.” Your second request for this information was sent via certified mail on September 21, and you received a confirmation letter dated September 28 informing you that the information was being compiled and you would be notified when it was available. As of October 30 you have received a copy of the check and a summary billing statement; hence, it has taken 75 days to respond to the request for documents that were approved by the Board of Public Works on July 11.

Part 5: This was an August 18 request for “all documentation related to check 124861 to vendor “Cardmember Service” from the claims of August 15, 2006. You specifically requested purchase orders and vouchers by number. When you sent your second request on September 21, 2006 you received a letter from the Controller dated September 28 that the information was being compiled. As of October 30 you had received only a billing statement with some handwritten notes. Although a portion of the requested information was received, it took the City 73 days to provide that information.

I sent a copy of each of your complaints to the City. The City provided a letter from Jonathan L. Mayes, Corporation Counsel. Mr. Mayes stated that the City has not denied any of the records you sought. The City’s previous Corporation Counsel, Ken Ferries, retired on August 11, 2006. Mr. Mayes assumed the duties of the office of Corporation Counsel on October 16, 2006. Within the first three weeks of Mr. Mayes’ tenure, the *Tribune* received responses to four of the six requests, either producing copies of records or making records

available for inspection. I take it from Mr. Mayes' response that he is counting six discrete requests within the five parts of your complaint.

The City has not purposefully determined it would not provide the *Tribune* with records. Rather, as a result of short-staffing in the Controller's office and the City operating without Corporation Counsel, the responses were delayed. Mr. Mayes believes that because there was no outright denial of records, your complaints are moot and should be dismissed.

In the alternative, many of your requests are vague and not reasonably particular, in violation of the Access to Public Records Act. Hence, the delay was due in part to the vagueness and the unreasonably broad nature of your requests. In turn, Mr. Mayes provided explanations specific to the five parts of your complaint.

For Part 1, you have received the information compiled by the City regarding attorney fees, which was sent to you on November 13, 2006. This production time was reasonable given the short staffing and personnel limitations. For Part 2, your request was not stated with reasonable particularity, since it would require that every City employee who assisted with programming be evaluated with respect to the time spent on that portion of their work. It is unreasonable to request records for "all city money" spent on KGOV. The City is currently processing the request. For Part 3, to provide an itemized listing or breakdown would require the City to create an additional report. Also, "any other costs" and "City labor" is vague and would require the City to dissect every hour city employees work to determine what hour involved "beautification" projects. A similar analysis would apply to costs of vehicles and fuel. On October 25, Mr. Mayes notified the *Tribune* (after consulting with me) that records responsive to this request were available in the City during its regular hours of business, and invited the *Tribune* to contact the City to schedule an appointment to review the records. To date, the *Tribune* had not contacted the City. For Part 4, on November 1, the City provided the records responsive to your request. The City provided copies of the four records given to you on November 1. According to the City, given the personnel limitations, the time within which the City produced these documents was reasonable. For Part 5, a 16-page packet was forwarded to the *Tribune* on October 25, six days before you filed your complaint with the Office of the Public Access Counselor. Due to the staffing shortages in the Controller's office, this was a reasonable time within which to produce the documentation.

To summarize, the City maintains that unless a record has been denied, a person may not file a formal complaint. When the *Tribune* filed its complaints, three of the five requests had been fulfilled, and the City has been working to provide information about the other two requests. In addition, when some records have been made available, the *Tribune* has failed to avail itself of the right to inspect the records at the City. Therefore, the City requested that the complaint be dismissed.

## ANALYSIS

Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). "Public record" means any information that is

“created, received, retained, maintained, or filed by or with a public agency.” IC 5-14-3-2(m). A public agency that does not maintain a public record is not required to create a record to satisfy a request for information. On the other hand, the public agency should clearly state that it does not maintain a record when a specific request is made, if that is the case. A public agency must regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. IC 5-14-3-7(a).

A request for inspection and copying must identify with reasonable particularity the record being requested. IC 5-14-3-3(a)(1). If a public agency receives a request that is not stated with reasonable particularity, the public agency should inform the requester that the request cannot be fulfilled as stated, and seek additional information or clarification from the requester. The public agency shall either provide the requested copies or allow the person to make copies on the agency’s equipment or on the person’s own equipment. IC 5-14-3-3(b).

If the public agency receives a request in person or by telephone, the public agency must respond within 24 hours or the request is deemed denied. IC 5-14-3-9(a). If the public agency receives a request via U.S. Mail or by facsimile, the request is deemed denied if the public agency fails to respond within seven days. IC 5-14-3-9(b). A response can acknowledge receipt of the request and state when or how the agency intends to comply.

The APRA does not set specific timeframes for when the records must be produced. This Office has often said that the public agency should provide the records within a reasonable time under the circumstances. Circumstances such as the number of records requested, whether the records are aged and stored off-site, peculiar staffing problems, and whether the records must be reviewed by counsel and redacted prior to disclosure are relevant to consideration of whether records have been produced within a reasonable time.

The City has not explained why it did not respond to your original requests, sent in early to mid August. You do not set out any failure to respond in your complaint; you appear to couch your complaint in terms of reasonable time to produce the records. Nevertheless, if the City did not respond to the August requests, they were denied in violation of the APRA.

With respect to your September 21, “second” requests, the City has challenged the *Tribune’s* right to file a complaint, where the City has never indicated it would deny the records. Certainly an outright denial of the record is actionable under the complaint procedures of the Office of the Public Access Counselor. *See* IC 5-14-5. The person who has not been provided the records after the public agency has issued a response assuring the person that the agency intends to comply would also have the right to complain if the person filing the complaint alleges that a *de facto* denial has occurred because the public agency has not provided the records within a reasonable period of time after receiving the request. IC 5-14-5-6(3).

A public agency that does not have a record that is responsive to the request should clearly state that to the requester, so that there is no misunderstanding with respect to whether the agency has denied a record that is maintained by the public agency. Hence, Part 1 and Part 3 appear to ask that the City compile a list or breakdown of certain information that likely would not be part of an existing record. The City would have been well advised to make clear to you in

its first responsive letter of September 21 that no such records existed. If the City was willing to compile or create an itemized listing of the information you sought where no such listing or record then existed, the City had no obligation to provide the listing to you within a reasonable period of time because the City was under no obligation to create the record. What is unclear from the information before me is whether or not the City already maintained a record showing the attorney fee and deductible information. I have a hunch that no such records existed, but it is imperative that the City explain this to you so that your expectations are that the City is willing, but not obligated, to provide information in an aggregate form to you. Assuming that the City was compiling the information for you in a new record, its failure to create and provide the compiled record within the “reasonable time” was not a violation of the APRA.

With respect to the costs of the city beautification project, this information was not part of a record, and the City indicated this in its October 25 letter. In your complaint, you contend that the City failed to tell you when the records would be available. This is not true. Mr. Mayes explained to you in his October 25 letter that the records could be viewed during the City’s office hours, between 8:00 a.m. and 4 p.m. He requested that you contact the City’s offices to schedule an appointment. This response was consistent with the requirements of the APRA. The *Tribune* should contact the City to arrange for a mutually agreeable time to review the records. However, the time within which the City sent the letter notifying you that the information was available to you was not reasonable.

With respect to Part 2, this request is broad and likely not stated with reasonable particularity, because you requested “all city expenditures for KGOV.” However, it was incumbent on the City to seek clarification from you concerning the scope of your request. As the City has observed, the time spent by City employees on particular projects is not aggregated in the fashion you requested, but perhaps you did not intend that the City account for staff time, only specific expenditures that are easily traceable to the beautification project. Again, to the extent that the City has no single document that lists all such expenditures, the City was not obliged to create such a document. Instead, the City should have explained that the City’s expenditures were contained in various payment records such as invoices, claims, and checks, and you would have the right to inspect those records. If the City is willing to compile this information into a new record, the time it has taken the City to compile the information is not an issue because the City has no obligation to create the new record. Still, the City should have, within a reasonable time, informed you that it would make available to you the various payment records concerning the KGOV expenditures.

For Part 4, this request was stated with reasonable particularity. You received the information on November 1 as you were filing this complaint. This was the four-page packet containing the purchase order, accounts payable transaction screen, check detail screen and bank statement. I agree with you that this information was not provided in a timely manner. This is information that could have been provided in the absence of corporation counsel, since the information is clearly disclosable. In addition, the staffing shortages, described as “a number of employees missed a number of days of work” does not suffice, in my estimation, to explain why this documentation could not have been provided in fewer than 75 days, over ten weeks. I understand that the City was also dealing with several other requests for information from the *Tribune*; however, when multiple requests for information are received, I have advised public

agencies to provide easy-to-compile records sooner than others so that there is no unreasonable delay.

For Part 5, the request was stated with reasonable particularity. Also, you complain that the City provided only a billing statement with handwritten notes, but you enclosed much more documentation than that. Hence, I take your complaint to be that the City had provided the information to you, but in an untimely manner. As with the information in Part 4, this documentation, although much more voluminous than the information in Part 4, was recent information and was concerning related expenditures. This information was provided 9½ weeks after your original August request. This too appears to be untimely production of the documents, for the same reasons stated above.

#### CONCLUSION

For the foregoing reasons, I find that the City is not required to create or compile a new record to satisfy your request for information. However, the City should have made clear whether, for each request, the City did or did not maintain a record. If the City did not maintain the specific compilation but had responsive records showing expenditures, such as claim vouchers or checks, the City should have made those records available to you. The City did not violate the APRA with its October 25 letter making certain records available to you and inviting you to schedule an appointment to view them.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Jonathan L. Mayes